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IN THE

Supreme Court of the United States

October Term, 1966

No. 1114

ERWINE LAVERNE,

Appellant,

against

PIRANESI IMPORTS, INC.,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

REPLY TO MOTION TO DISMISS

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I

Appellee sets forth as "facts" the very allegations which have been disputed by appellant and which were resolved against appellant without a hearing, thereby depriving him of his property without due process of law.

Appellee commences his Statement of the Case (p. 2) with a recitation of how appellant purportedly sought to evade lawful process to enforce a judgment; how he acted "to purge himself of contempt," etc., etc. Such recital is wholly immaterial and serves only to obscure the real issues herein. Appellee proceeds to recite as "facts" (pp. 3, 4, 5) the very matters whose existence was in such sharp dispute below. It was the existence of these "facts" which appellant strenuously denied in his affidavits in the trial court and which he was denied his constitutional right to litigate.

Appellee notes (p. 4) that appellant submitted affidavits in opposition and that this adequately presented whatever defense appellant had. Yet all these affidavits did was to sharpen and identify the existence of many factual conflicts between the parties. Nevertheless, a receiver was appointed without appellant having had his day in court to litigate those issues. The transcript of an examination of appellant, which appellee describes as being "primarily" the basis upon which the motions were granted (p. 4), is concededly uncorrected and unsigned by appellant.

Appellee now seeks to buttress his case by reference to a purported subsequent examination which was never before the trial court either originally or upon reargument, and which is not part of the record before this Court. Clearly, the attempt to support Court orders by reference to alleged materials never before the Court when the orders were made cannot cure the constitutional infirmities implicit in the trial court's granting of both motions without giving appellant an opportunity for a hearing. (See Jr. St. 11). This Court has never held constitutional infirmities to be cured by subsequent proceedings, particularly where the notice and hearing requirement is involved. To the contrary, such subsequent proceedings have been rejected as an excuse for denying due process at the initial proceeding. See, e.g., *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

Moreover, the purported transcript of the subsequent examination is not only unsigned and uncorrected; it has never even been seen by appellant. The attempt to rely upon this unsigned, uncorrected and unread transcript is another illustration of appellee's effort to eliminate the existence of factual disputes upon which no hearing has been held by treating its bald assertions as undisputed facts. Finally, if the second examination contains details which appellee charged were not presented by appellant in the first (Nathan affirmation, Nov. 8, 1965) or if there be

inconsistencies between the two transcripts, the subsequent transcript, in either event, emphasizes the existence of fact questions concerning the first, which appellee contends the trial court "primarily" relied upon in appointing a receiver without a hearing.

The trial court's phrase "given by Erwine Laverne to his son, and fraudulently hidden or transferred," in referring to the $89,000, cannot be passed off as a "merely descriptive phrase" (p. 5). Obviously, when the trial court specified the $89,000 as part of the property to be received (see N.Y.C.P.L.R. Sec. 5228 (a)), it thereby determined that Erwine Laverne had acted fraudulently for it could not otherwise have treated this money "given by Erwine Laverne to his son" as still, constructively at least, in the possession of Erwine Laverne and therefore available to his creditors. Indeed, this is precisely what the Court found, without a hearing, when it added the unambiguous phrase "fraudulently hidden or transferred." (Jur. St. 3a)

II

For a state court to deprive a litigant of $89,000 without a hearing to resolve disputed facts constitutes a serious violation of due process and presents a substantial federal question.

1. Appellant, of course, agrees that under certain circumstances rights can be determined on the basis of affidavits alone. However, such a determination must be based upon affidavits which do not reveal on their face substantial and sharply disputed questions of fact, as is the case herein. (See Jur. St. 12, 13) That receivers were appointed "presumably" based on affidavits (as asserted by appellee, p. 7) finds no support in either *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112 (1909), or *St. Louis, Cape Girardeau and Fort Smith Railway Co.* v. *Merriam*, 156 U.S. 478 (1895)

both cited by it. Neither of these cases speak at all about appointment of receivers on the basis of any affidavits, no less affidavits showing sharp factual disputes.

2. The Constitutional issue herein is not avoided by noting that the nature of the notice and hearing required by due process may vary based on the type of proceeding involved and the nature of the rights to be determined (p. 7). The real problem herein is that *no* hearing whatsoever was allowed where the determination of substantial property rights was made solely on the basis of sharply conflicting affidavits (See Jur. St. 10, 11).

3. Appellee misses the point of this appeal when he attempts to limit it to the sole question of the appointment of a receiver. A receiver was not appointed in the abstract. Rather, he was expressly appointed as the receiver of certain specific property including the $89,000. This is equally true of the turn-over order which specifies a particular piece of property to be turned over. By the orders of the trial court issued without a hearing concrete property rights of the appellant have been actually impaired.

4. Appellee suggests (p. 8) that appellant must justify his demand for a hearing by showing his "need" to cross-examine witnesses or attack credibility in the proceedings below. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915), clearly demonstrates that in a proceeding such as this, to charge appellant's purported property with a judgment debt, notice and hearing are required, without a showing of necessity. *Colby* v. *Klune*, 178 F.2d 872 (2nd Cir. 1949), cited by appellee, does not hold otherwise. Nothing therein suggests that the party seeking the trial must show a "need." Indeed, that case strongly supports appellant's contention that where factual disputes exist in the affidavits a trial must be had, as the case will then turn on credibility of witnesses. See also *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F.2d 1016 (3rd Cir. 1942). Nor is *Willner* v.

Committee on Character & Fitness, 373 U.S. 96 (1963), contrary. There it was held that due process had been denied petitioner in failing to accord him a hearing on his application to the bar. There is nothing therein to indicate that any burden was on petitioner to show the necessity for a hearing. Notice and hearing are essential and indispensible and do not depend upon showing a "need." (Jur. St. 10, 11)

5. In opposition to appellant's argument that he was denied meaningful legal representation, appellee notes that appellant's new attorney was given an opportunity to file an affidavit on reargument (p. 9). Clearly this does not cure the constitutional infirmity inherent in the trial judge's failure, originally, to grant appellant's requested continuance. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), this Court held that it is no defense to a claim of denial of due process to show that petitioner had his day in court through use of a motion to set aside a decree, on the grounds that the burden of proof had unconstitutionally shifted to petitioner. This exact situation exists herein. Appellant was denied meaningful legal representation prior to the original decision of the trial court. This constitutional infirmity clearly, and particularly in light of *Armstrong*, was not cured by appellant moving for reargument, because the burden of proof had unconstitutionally shifted to him.

III

The federal questions were timely raised at all stages of the proceeding below.

1. Appellee asserts (pp. 9-12) that appellant failed to raise the federal questions in the trial court below and raised them for the first time in the Appellate Division. The record clearly indicates that at the very commencement of these proceedings appellant raised his constitutional claim to a trial or hearing on the merits. (See Laverne Affidavit, Dec. 15, 1965).

This Court has never required magic words or precise formulas for such a purpose: "if the record as a whole shows either expressly or by clear intendment that [the claim was brought to the attention of the state court] the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 68 (1928). Similarly, this Court noted in *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58, 67 (1898) that: "no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court." See also *St. Louis, Iron Mountain & Southern Railway Co.* v. *Starbird*, 243 U.S. 592 (1917).

Appellee contends that in *Mellon* v. *O'Neill*, 275 U.S. 212 (1927), the Court, "under nearly the same circumstances", refused jurisdiction (p. 12). Yet that case is clearly inapplicable to the case at bar because there the Federal constitutional issue was not even raised in the state appellate courts. Similarly, in *Miller* v. *Texas*, 153 U.S. 535 (1894), *Pim* v. *St. Louis*, 165 U.S. 273 (1897), and *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932) (cited by appellee, p. 10), this Court refused to take jurisdiction because, in each case, the Federal constitutional question was raised for the first time on a motion to reargue in the highest appellate court of the state involved.

2. Neither *Bailey* v. *Anderson*, 326 U.S. 203 (1945), or *Erie R. Co.* v. *Purdy*, 185 U.S. 148 (1902), are authority for the proposition stated by appellee (p. 10) that a litigant is required to follow state procedures in raising Federal constitutional issues. The rule that state procedures must be followed applies only where there are specially prescribed procedures laid down under state rules; these must be complied with in order properly to preserve a constitutional question for this Court. *Williams* v. *Georgia*, 349

U.S. 375, 382, 383 (1955). See, e.g., where special state procedures should have been complied with: *Parker* v. *Illinois*, 333 U.S. 571 (1948); *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190 (1925); *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447 (1936). The rule is clearly inapplicable herein where New York State has provided no special avenue or proceeding by which to raise constitutional objections. Appellant herein has raised the constitutional question, first in the trial court, and then at each level of appeal thereafter and the state law requires no more than this.

3. When appellant first appealed to the Appellate Division from the two orders in question herein, he sought reversal on the basis of five claims of law, all of which were constitutional objections to the trial court's actions, except one which claimed error in the order directing turnover of the stock certificate to the sheriff rather than to the receiver. In affirming without opinion, the Appellate Division obviously decided these constitutional questions adversely to appellant. It has never been essential that a state appellate court expressly pass on the constitutional questions presented, so long as these questions appear in the record, which is the case herein, *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626 (1900), and so long as the necessary effect of the appellate court's judgment is to deny those claims, *Roby* v. *Colehour*, 146 U.S. 153, 159 (1892). See also *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 231, 232 (1897); *Sayward* v. *Denny*, 158 U.S. 180, 183, 184 (1895).

Patently, the cases cited by appellee (p. 11) do not require a contrary conclusion. In *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U.S. 646, 650 (1925), this Court noted that the constitutional question had to have been called to the attention of the state appellate court *or*, even if not called to its attention, nevertheless had to have been

decided by it. And in *Marrow* v. *Brinkley*, 129 U.S. 178 (1889), the state appellate court had rested its decision specifically on state law grounds. Similarly, both *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52 (1934), and *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956), involved state appellate decisions which rested on sufficient state law grounds.

Such doctrines are clearly inapplicable herein where the only possible ground of review was on the constitutional points raised in appellant's papers to the Appellate Division. This is not a case of ambiguity or of support in the state court opinions on both federal and non-federal grounds. Appellee is trying to inject ambiguity where none exists.

IV

There is no adequate non-federal ground on which to rest the orders below.

Appellee's argument regarding the presence of adequate non-federal grounds obviously misconceives the nature of that doctrine. Appellee describes the non-federal grounds as "Appellant's own conduct and testimony [which] demonstrated the need for a receiver and a turn-over of the stock certificates." (p. 13). However, these very grounds necessarily raised the federal question.

The determination of what was the nature and meaning of appellant's conduct and testimony was the subject of sharp factual dispute in the affidavits. To thereupon appoint a receiver and order a turnover was, thus, to raise the federal constitutional issue of whether appellant's rights could be determined without a hearing solely on the basis of affidavits containing sharp disputes of fact.

This Court's discussion of the non-federal ground doctrine in *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935) (cited by appellee, p. 13), clearly shows that there are no

adequate non-federal grounds. In the cited case this Court noted that a purported non-federal ground is so interwoven with the federal question as to not deprive the court of jurisdiction where the non-federal ground has the effect of bringing forward for determination the federal question. This is precisely the situation herein. To base the orders on appellant's "own conduct and testimony" necessarily raised for determination the constitutional question of whether such orders could be made without a hearing on appellant's conduct and testimony upon which there had been sharp factual disputes in the affidavits.

CONCLUSION

Appellant respectfully requests that the substantial and important constitutional questions herein be given plenary consideration.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LAVERNE *v.* PIRANESI IMPORTS, INC.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 1114. Decided May 8, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.